(3)

91-866

No. _____

Supreme Court, U.S.
FILED
Nov
DEC 21 1991
OFFICE OF THE CLERK

In the

Supreme Court of the United States

October Term, 1991

ROBERT M. ADAMS, ET AL.,

Petitioners,

v.

LTV STEEL MINING COMPANY,
ORE MINING COMPANIES PENSION PLAN
AND PENSION COMMITTEE,
ORE MINING COMPANIES PENSION PLAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Raymond L. Erickson*
Richard J. Leighton
HANFT, FRIDE, O'BRIEN, HARRIES,
SWELBAR & BURNS, P.A.
1000 First Bank Place
130 West Superior Street
Duluth, Minnesota 55802-2094
(218) 722-4766

Counsel for Respondents

*Counsel of Record

1991 — Bachman Legal Printing, 835 Second Ave. So., Mpls., MN 55402 — (612) 339-9518
■ FAX 612-337-8053

QUESTIONS PRESENTED FOR REVIEW

1. Did the Employer or the Pension Committee violate the Employee Retirement Income Security Act [hereinafter "ERISA"] by informally or formally amending the pension plan with respect to the provision of early retirement benefits?

2. Did the Employer or the Pension Committee breach any fiduciary duties, in violation of 29 U.S.C. § 1104(a)(1) of ERISA, by denying the requests of certain bargaining unit employees for early retirement benefits when the benefits were not in the mutual interests of the applicants and the employer as required by the pension plan?

3. Did the Employer or the Pension Committee discriminate against certain bargaining unit employees, in violation

of 29 U.S.C. § 1140 of ERISA, by denying the requests of those employees for early retirement benefits?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW.....	1
TABLE OF AUTHORITIES.....	5
STATEMENT OF THE CASE.....	8
REASONS FOR DENYING THE PETITION.....	25
Introduction.....	25
I. Neither the Employer nor the Pension Committee violated ERISA by informally or formally amending the Pension Plan with respect to the provision of early retirement benefits.....	29
II. Neither the Employer nor the Pension Committee breached any fiduciary duties in violation of 29 U.S.C. § 1104(a)(1) of ERISA, by denying the requests of certain bargaining unit employees for early retirement benefits when the benefits were not in the mutual interests of the applicants and the	

employer as required by the Pension Plan..... 38

III. Neither the Employer nor the Pension Committee discriminated against the Petitioners, in violation of 29 U.S.C. § 1140 of ERISA, by denying the requests of the Petitioners for early retirement benefits... 42

Conclusion..... 48

TABLE OF AUTHORITIES

	Page
Statutory Provisions Involved:	
26 U.S.C. § 401(a).....	35
29 U.S.C. § 1054(g).....	30, 31, 36
29 U.S.C. § 1104(a)(1)...	1, 38
29 U.S.C. § 1140.....	1, 43 44, 46, 47
Treas. Reg. § 1.411(d)-4, Q&A 2.....	34
Treas. Reg. § 1.411(d)-4, Q&A-8(b).....	35
Treas. Reg. § 1.411(d)-4, Q&A-9(c)(3).....	31
U.S. Supreme Court Cases:	
Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).....	48
Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).....	48
Federal Cases:	
Adams v. LTV Steel Mining Co., 936 F.2d 368 (8th Cir. 1991)...	26
Ashenbaugh v. Crucible, Inc., 1975 Salaried Retirement Plan, 854 F.2d 1516 (3rd Cir. 1988), cert. denied, 490 U.S. 1105 (1989).....	31

Baker v. Kaiser Aluminum & Chem. Corp., 608 F.Supp. 1315, (N.D.Calif. 1984)..... 47
Berger v. Edgewater Steel Co., 911 F.2d 911 (3rd Cir.) cert. denied, 111 S.Ct. 1310 (1991). 25, 26, 36, 41
Corum v. Farm Credit Services, 628 F.Supp. 707 (D.Minn. 1986). 47
Dister v. Continental Group, Inc., 859 F.2d 1108 (2d Cir. 1988)... 45
Dockray v. Phelps Dodge, 801 F.2d 1149 (9th Cir. 1986)..... 28
Dzinglski v. Weirton Steel Corp., 875 F.2d 1075 (4th Cir.) cert. denied, 110 S.Ct. 281 (1989).. 25, 26, 41
Fletcher v. Kroger Co., 942 F.2d 1137 (7th Cir. 1991)..... 26, 37, 41
Gavalik v. Continental Can Co., 812 F.2d 564 (8th Cir. 1988)... 45, 46
Hickman v. Tosco Corporation, 840 F.2d 564 (8th Cir. 1988)... 40
Hlinka v. Bethlehem Steel, 863 F.2d 279 (3rd Cir. 1988)..... 25
Nash by Nash v. Krivaja Beechbrook Corp., 866 F.2d 1053 (8th Cir. 1989)..... 42
Titsch v. Reliance Group, Inc., 548 F.Supp. 983 (S.D.N.Y. 1982) aff'd mem., 742 F.2d 1441 (2nd Cir. 1983)..... 45
Varhola v. Doe, 820 F.2d 809 (6th Cir. 1987)..... 46
West v. Butler, 621 F.2d 240 (6th Cir. 1980)..... 44

Miscellaneous:

Revenue Ruling 85-6,
1985-1 C.B. 133..... 31
Rule 10 of the Rules of the
United States Supreme Court.... 25, 27, 49
Senate Report No. 98-575..... 32

STATEMENT OF THE CASE

All of the claims of the Petitioners arise from the "70/80 Retirement" provisions of Paragraph 2.6(d) of the Ore Mining Companies Pension Plan ("Pension Plan"). Paragraph 2.6(d) provided as follows:

> Any Participant who has not attained the age of 62 years and who shall have had at least 15 years of Continuous Service and (i) shall have attained the age of 55 years and whose combined age and years of Continuous Service shall equal 70 or more, or (ii) whose combined age and years of Continuous Service shall equal 80 or more, and
>
> * * *
>
> (d) who considers that it would be in his interest to retire, and his Employing Company considers that such retirement would likewise be in its interest and, by applying like rules in a non-discriminatory manner to like or similar

> circumstances, approves an application for retirement under mutually satisfactory conditions,
>
> shall be eligible to retire on or after April 1, 1986 and shall upon his retirement (hereinafter "70/80 retirement") be eligible for a pension.

As a consequence of this provision, those Petitioners whose combined age and years of Continuous Service equaled 70 or 80 or more could apply for an early retirement and, if such a retirement was also in the interests of the Employing Company [i.e., LTV Steel Mining Company], the retirement would be given.

The provisions of the Pension Plan were secured through negotiations between the Employing Company and the United Steelworkers of America [sometimes hereinafter "Union"], which is and was the recognized bargaining agent of the

Petitioners. As provided in the Pension Plan, a 70/80 mutually satisfactory retirement would entitle the recipient to full retirement benefits, that is, the benefits would not be actuarially reduced from the benefits which would otherwise be available from a normal retirement which would be awarded after at least 30 years of service. In addition, the 70/80 mutually satisfactory retirement would award a $400 increment to be paid on a monthly basis so as to provide the retiree with a "bridge" until the retiree should reach the age of 62 and thereby be qualified to receive Social Security benefits. For obvious reasons, this type of early retirement provided a substantial inducement for an employee to retire prior to his having accumulated 30 years of service. The 70/80 mutually

satisfactory retirement has also served as a useful tool for the Employing Company in the reorganization of the salaried work force at Erie Mining Company/LTV Steel Mining Company.

At all pertinent times, Pickands Mather & Co. has been the Managing Agent for Erie Mining Company which, in the spring of 1986, was wholly acquired by LTV Steel Company, Inc., when LTV Steel purchased the ownership interests in Erie Mining Company which had previously been held by three other steel companies. Following the acquisition of Erie Mining Company, LTV Steel changed the name of that operation to LTV Steel Mining Company [hereinafter the "Employing Company" or the "Company"] but continued to contract with Pickands Mather to provide services as a managing agent.

Following the acquisition of Erie Mining Company, LTV Steel assumed a greater responsibility and involvement in matters of industrial relations and employee benefits, including pension benefits. At about the time of this acquisition, the productive capacity of the taconite plant was downsized from 7 million tons of taconite pellets to 6 million tons.

Throughout the early 1980's, as Erie Mining Company and the entirety of the taconite mining industry were being devastated by a weak market for taconite pellets, the Employing Company, and its managing agent, sought to economize and restructure its salaried work force so as to remain economically viable. Through terminations, transfers in employment, natural attrition, and retirements, Erie Mining Company's salaried work force was

permanently reduced from approximately 800 to 200 employees. Part of this permanent reduction in salaried employee job positions was accomplished through the award of 70/80 mutually satisfactory retirements. The granting of such retirements to the salaried work force was in the interests of the Employing Company since the Company's salaried payroll would be permanently reduced during future operations which, in turn, would produce a reduction in future operating expenses and greater operating efficiencies. The permanent reductions in the number and in the types of job positions in the salaried work force was facilitated by the salaried employees having an employee-at-will relationship with the Company.

On the other hand, the bargaining unit employees, including all of the Petitioners, had an employment contract which had been negotiated by the Employing Company and the United Steelworkers of America, and which provided job security that was not available to the salaried work force. As a consequence of the employment contract, the Company was not able to unilaterally and permanently remove job positions from the bargaining unit without the agreement of the Union. While the Company was authorized by the collective bargaining agreement to lay off bargaining unit employees during times of low production, those layoffs were governed by the seniority provisions of the collective bargaining agreement which provided

greater job security to those employees having greater seniority.

During the same period of time that Erie Mining Company was permanently reducing its salaried work force, negotiations were underway to permanently reduce the bargaining unit job positions, but those negotiations were not successful. Although there would be an understandable interest in the Company to permanently reduce its work force and, therefore, its payroll expense, the award of a 70/80 pension to an employee which did not produce a permanent reduction in job positions or classifications would be contrary to the interests of the Company. Since the Pension Plan was solely funded by the Employing Company, the award of a 70/80 mutually satisfactory retirement would be an additional expense to the

Company in and of itself. Additionally, if the 70/80 retirement did not produce a permanent reduction in job positions, the retiring employee would have to be replaced by a new employee, which would generate production inefficiencies until the new employee should become fully trained and experienced in his job assignments.

Moreover, the training of the new employee, both the task training and the extensive training required by the regulations of the Mine Safety and Health Administration [MSHA], also would increase the expenses of the Company if the 70/80 retirement did not produce a permanent reduction in jobs. Since the new employee would be covered by the Pension Plan, the Company's health and life insurance plans, and would be

entitled to other employee benefits, there would be further increased expenses to the Company. Consequently, rather than reducing the Company's work force expense, the granting of a 70/80 in circumstances which did not produce a permanent reduction in job positions, would merely increase the work force liability of the Company in order to produce the same or less product until the new employee was fully trained and experienced. Under such circumstances, the use of 70/80 mutually satisfactory retirements would not be an exercise of good business judgment because permanent reductions in job positions in the work force would not be accomplished. Moreover, despite the fact that the Pension Plan was overfunded, the granting of the requested early retirements would

adversely affect the operation of LTV Steel Mining Company, and if extended plant-wide to all employees solely on the basis of age and service, the effect would devastate the Company's ability to competitively operate.

As noted, during the 1980's, Erie Mining Company did successfully and permanently reduce its salaried work force in part through the granting of 70/80 mutually satisfactory retirements. During the same period of time, the Company was able to negotiate the permanent reduction in two classified jobs in the bargaining unit, as to which two 70/80 mutually satisfactory pensions

were awarded to the retirees.[1] As was true with the permanent salaried reductions, such permanent reductions in the job positions of the bargaining unit work force were consistent with good business judgment and were in the interests of the Company. When confronted with "like or similar circumstances", namely, a permanent reduction in the job positions in the work force, the Pension Committee has awarded 70/80 mutually satisfactory retirements to the bargaining unit. As a consequence of the Labor Management Relations Act, the permanent elimination

[1]Petitioners suggest that these reductions were not permanent, but the Affidavit evidence of the Respondents that these reductions were permanent was unrebutted.

of bargaining unit classified jobs requires the involvement and agreement of the collective bargaining agent. In this case, the 70/80 mutually satisfactory pensions that were awarded to the bargaining unit in 1987 had received the approval of the collective bargaining agent.

With respect to the claims of the Petitioners for 70/80 mutually satisfactory retirements, no concurrent reductions in the work force had been agreed to by the Company and the Union and, indeed, LTV Steel Mining Company was expanding its bargaining unit work force during the period in which the Petitioners' applications for 70/80 retirements were made. At the time that the 70/80 retirements were requested in 1987, LTV Steel Mining Company had called

back the bargaining unit employees who had been on layoff and was hiring additional bargaining unit employees "off the street."[2] In contrast, during the period from 1982 to 1986, when certain salaried employees were granted 70/80 retirements, Erie Mining Company was eliminating salaried jobs and was not in a "hiring mode" for salaried personnel. When the Company was hiring bargaining unit employees, there was no hiring of

[2]Through a series of assumptions drawn from exhibits proffered by the Petitioners that are not self-explanatory, Petitioners imply that the Employing Company's bargaining unit work force was not expanding. Not withstanding such baseless assumptions, the Respondents' Affidavit evidence in support of their Motion for Summary Judgment was uncontroverted that the Employing Company was hiring additional bargaining unit employees off the street at the time that Petitioners were seeking early retirement.

salaried employees. Notably, the Union did not grieve or otherwise contest the denial of the 70/80 mutually satisfactory retirements to the Petitioners, although the Union was requested to do so by the Petitioners, because the Company's actions were entirely consistent with the underlying agreement of the Company and the Union.

Finally, in Paragraph 13 of Petitioners' First Amended Complaint, Petitioners allege that on December 31, 1987, without any notice to the Petitioners or the United Steelworkers, the Respondents "unilaterally" amended the Pension Plan, "without the consent of the Steelworkers", by eliminating 70/80 retirements under the mutually satisfactory conditions requirement. This allegation has never been

subsequently modified or amended even though Respondents had attached to their original Answer and to their Answer to Petitioners' First Amended Complaint the written agreement of the Steelworkers and the Employing Company which expressly authorized the elimination of the pertinent 70/80 retirements effective January 1, 1989. Had the Company and the Steelworkers failed to secure such an agreement, the Pension Plan could have lost its favorable tax treatment status. Despite their attempt to do so, the Employing Company and the Steelworkers were not able to devise any amendment to the discretionary language in Paragraph 2.6(d) other than the elimination of that language. By the agreement of the Company and the Steelworkers, that amendment would be formally adopted with

an effective date of January 1, 1989. In the interim, and with the consent of the United Steelworkers, the Plan has been administered since January 1, 1989 with the mutually satisfactory provision deleted. Petitioners have never joined or attempted to join the United Steelworkers as a party to the action below.

REASONS FOR DENYING THE PETITION

Introduction

Understandably, in expressing the reasons for granting their Petition, Petitioners ignore the criteria addressed in Rule 10 of this Court's Rules. Those criteria reflect the character of the reasons that the Court will consider in exercising its discretion to review on a Writ of Certiorari. In contrast to those criteria, here there is no conflict in the decisions of the Courts of Appeals which have considered issues arising from similarly worded 70/80 early retirement provisions or other early retirement programs. See, Hlinka v. Bethlehem Steel, 863 F.2d 279 (3rd Cir. 1988); Dzinglski v. Weirton Steel Corp., 875 F.2d 1075 (4th Cir.) cert. denied 110 S.Ct. 281 (1989); Berger v. Edgewater

Steel Co., 911 F.2d 911 (3rd Cir. 1990) cert. denied 111 S.Ct. 1310 (1991); Adams v. LTV Steel Mining Co., 936 F.2d 368 (8th Cir. 1991); and Fletcher v. Kroger Co., 942 F.2d 1137 (7th Cir. 1991). Moreover, the holdings of these Courts of Appeals are not in conflict with any decisions of this Court, nor do Petitioners point to any such conflict. Indeed, this Court has previously considered the same or nearly the same arguments that the Petitioners advance here and has consistently denied certiorari. See, Berger v. Edgewater Steel Co., supra, and, Dzinglski v. Weirton Steel Corp., supra. Petitioners do not claim, nor is there any basis for them to claim, that the Court of Appeals below departed from the accepted and usual course of judicial proceedings nor

do they provide any basis to believe that an important question of Federal law is raised by their Petition which should be settled by this Court. Although Petitioners clearly dislike the holdings of the United States Courts of Appeals in the Third, Fourth, Seventh and Eighth Circuits, the only arguments they advance as an expression of their dislike are contained in concurring or dissenting opinions which failed to secure majority support in any Circuit. In the absence of a compelling argument that any of the criteria of Rule 10 warrant the granting of their Petition, Petitioners take unwarranted liberties in criticizing the

decisions of the Trial Court and the Court of Appeals below.[3]

[3]Without attempting to exhaust the examples, the following reflect the excessive bounds of Petitioner's advocacy. In Footnote 1 to their Petition, Petitioners accuse the Court of Appeals of a misstatement of fact. As the most cursory review of the evidence in this record confirms, the quoted language in that footnote contains no misstatement of fact. Indeed, despite the uncontradicted evidence in the record, Petitioners continue to allege that no agreement had been reached by the Employing Company and the Union to amend the Plan to eliminate Subsection 2.6(d).

In Footnote 2 to their Petition, Petitioners seek to undermine the authorities which support the "dual capacity" doctrine and which recognize that an employer for business reasons may make decisions which are not subject to fiduciary principles. At no time in these proceedings, however, have the Petitioners cited any decisional authority which has considered the dual capacity doctrine and rejected the same. Petitioners' citation of Dockray v. Phelps Dodge, 801 F.2d 1149 (9th Cir. 1986), on page 18 of their Petition, is a case in point as the Court there neither

(Footnote Continued)

I.

Neither the Employer nor the Pension Committee violated ERISA by informally or formally amending the Pension Plan with respect to the provision of early retirement benefits.

(Footnote Continued)
considered nor addressed the dual capacity doctrine.

On page 19 of their Petition, Petitioners argue that it "is undisputed * * * that the employer did not apply [its decision to deny early retirement without a permanent reduction in the work force] as a 'guideline'." The contention is without evidentiary support. When faced with like circumstances involving permanent reductions in the work force, early retirements were granted to hourly and salaried employees alike. While Petitioners seek to discredit the holdings of the Trial Court and the Court of Appeals that early retirements were given to hourly employees, there is no evidence in this record to contest those holdings. Other examples of the Petitioners' abounding advocacy will be addressed in subsequent sections of this Brief.

In arguing that the Court of Appeals' decision in this case "emasculates" the provisions of the Retirement Equity Act of 1984, 29 U.S.C. § 1054(g)(2), Petitioners embark on an exercise in fatigue failure. During their arguments in favor of summary judgment before the Trial Court below, Petitioners argued that the Treasury Regulations promulgated pursuant to § 1054(g) entirely supported their position. Having failed to so persuade the Trial Court, on appeal the Petitioners argued that the same Treasury Regulations were ultra vires and therefore null and void. The Court of Appeals having rejected the Petitioners' argument on those grounds, Petitioners now return to argue that the Treasury

Regulations, or at least some of them, are supportive of their concerns.[4]

In point of fact, when not taken out of context and when read in conjunction with the legislative history of § 1054(g), Congress' intent to permit amendments to pension plans is clear

[4]Contrary to Petitioners' contention that the Treasury Regulations were applicable to the Pension Plan in this case prior to the denial of their early retirement applications in 1987, the Regulations expressly provided that they were not applicable to an existing collectively-bargained plan until Jan. 1, 1989. Treas. Reg. § 1.411(d)-4, Q&A-9(c)(3). In any event, the Regulations support the Respondents' actions in amending the Plan when they did. See infra at 33-36. Moreover, prior rulings of the Treasury Department and appellate courts further support the position that Respondents' actions did not violate § 1054(g). See Rev. Rul. 85-6, 1985-1 C.B. 133; Ashenbaugh v. Crucible, Inc., 1975 Salaried Retirement Plan, 854 F.2d 1516, 1527-28 & n. 12 (3rd Cir. 1988), cert. denied, 490 U.S. 1105 (1989).

where those amendments are to eliminate early retirement benefits which, if left unaltered, would result in the loss of the tax qualified status of the Pension Plan. Senate Report No. 98-575 provides in pertinent part:

> Also, the committee expects that Treasury regulations will permit participants to elect to reduce accrued benefits in a defined benefit pension plan where those benefits would otherwise exceed the overall limits on contributions and benefits (sec. 415 of the Code) or cause prohibited discrimination under the plan. [1984-2C.B. 447,471, Emphasis supplied].

The same Senate Report went on to state:

> Under the bill, to the extent provided by Treasury Regulations, a benefit option may be eliminated with respect to benefits accrued before the date the amendment is adopted. The committee expects that, for example, the elimination of an option with respect to previously accrued benefits is not to be prohibited by a plan

> amendment to the extent the elimination of the option is required as a condition of meeting the standards for qualified status of the plan.
>
> The Regulations also could permit the elimination of an option if (1) the elimination of the option does not eliminate a valuable right of a participant or beneficiary and, (2) the option is not subsidized or a similar benefit with a comparable subsidy is provided. [Id. Emphasis supplied].

Obviously, the Senate Report reflects the intention of Congress that the Treasury Department promulgate regulations which would preserve the tax qualified status of pension plans through the deletion of optional early retirement benefits that contain elements of employer discretion.

Moreover, Petitioners have never contested the fact that the literal language of the Treasury Regulations permits the elimination of early

retirement benefits in order to preserve the qualified tax status of a pension plan. For example, Treasury Regulation § 1.411(d)-4, Q&A 2 provides in pertinent part:

> A plan may not be amended to eliminate or reduce a Section 411(d)(6) protected benefit that has already accrued, except as provided in Sections 412(c)(8) and 4281, and in paragraph (b) of this Q&A 2.
>
> * * *
>
> (b) Section 411(d)(6) protected benefits that may be eliminated or reduced only as permitted by the Commissioner--(1) In general. The Commissioner may, consistent with the provisions of this Section, provide for the elimination or reduction of Section 411(d)(6) protected benefits that have already accrued only to the extent that such elimination or reduction does not result in a loss to plan participants of either a valuable right or an employer subsidized form of benefit where a similar optional form of benefit with a comparable subsidy is not provided or to

> the extent such elimination or reduction is necessary to permit compliance with other requirements of Section 401(a)(e.g., Sections 401(a)(4), 401(a)(9) and 415). * * * [Emphasis supplied].

Notably, Section 401(a), as referenced above, relates specifically to the tax qualified status of a pension plan. See, 26 U.S.C. § 401(a).

Nor have Petitioners ever contended that Respondents and the Petitioners' Union modified the Pension Plan in violation of the Treasury Regulations. In this respect, Treasury Regulation § 1.411(d)-4, Q&A-8(b) specifically provides in pertinent part as follows:

> If the availability of an optional form of benefit, early or late retirement benefit, or retirement-type subsidy under an existing plan is conditioned on the exercise of employer discretion, the plan must be amended either to eliminate the optional form of benefit, early

> or late retirement benefit, or retirement-type subsidy to make such benefit available to all participants without limitation, or to apply objective and nondiscriminatory conditions to the availability of the optional form of benefit, early or late retirement benefit, or retirement-type subsidy. [Emphasis supplied].

Both the Trial Court and the Court of Appeals below determined that the mutually-agreed upon amendment which Petitioners here contest was not in violation of 29 U.S.C. § 1054(g). And, while Petitioners dispute those holdings, they cite no contrary authorities. In point of fact, the holdings of the Trial Court and the Court of Appeals are consistent with the holdings and analysis of the United States Court of Appeals for the Third Circuit in Berger v. Edgewater Steel Co., supra, and cases cited therein

and of the United States Court of Appeals for the Seventh Circuit in Fletcher v. Kroger Co., supra.

Moreover, the Trial Court and the Court of Appeals rejected Petitioners' complaint that the Respondents informally amended the Pension Plan by refusing to grant Petitioners' request for early retirement. In point of fact, the pension provision at issue permits the Pension Committee to apply "like rules in a nondiscriminatory manner to like or similar circumstances." The evidence in this record is uncontested that when confronted with like or similar circumstances, namely the permanent reduction in job positions in the work force, early retirement benefits were granted to salaried and hourly employees alike. As the Court of Appeals noted,

this guideline did not amend the Pension Plan.

Neither the Employer nor the Pension Committee violated ERISA by informally or formally amending the Pension Plan with respect to the provision of early retirement benefits and the Petition for Certiorari should not be granted.

II.

Neither the Employer nor the Pension Committee breached any fiduciary duties in violation of 29 U.S.C. § 1104(a)(1) of ERISA, by denying the requests of certain bargaining unit employees for early retirement benefits when the benefits were not in the mutual interests of the applicants and the employer as required by the Pension Plan.

Although the Petitioners take issue with the "dual capacity" doctrine, they

cite no authority to contest its application in this case. The rationale for the doctrine was recently explained by the United States Court of Appeals for the Eighth Circuit, in a manner consistent with the rationale of the other Circuits which have addressed the issue, as follows:

> * * * [T]he ERISA scheme envisions that employers will act in a dual capacity as both fiduciary to the plan and as employer. ERISA does not prohibit an employer from acting in accordance with its interests as employer when not administering the plan or investing its assets. Phillips v. Amoco Oil Co., 799 F.2d 1464, 1471 (11th Cir. 1986) (Phillips), aff'g 614 F.Supp. 694, 716-17 (N.D.Ala. 1985), cert. denied, --- U.S. ---, 107 S.Ct. 1893, 95 L.Ed.2d 500 (1987). ERISA does not require that "day-to-day corporate business transactions, which may have a collateral effect on prospective, contingent employee benefits, be performed solely in the interest of plan

> participants." Phillips, 614 F.Supp. at 718, citing Sutton v. Weirton Steel Division of National Steel Corp., 567 F.Supp. 1184, 1200-01 (N.D.W.Va.), aff'd 724 F.2d 406, 411 (4th Cir. 1983), cert denied, 467 U.S. 1205, 104 S.Ct. 2387, 81 L.Ed.2d 345 (1984). Accord, N.L.R.B. v. Amax Coal Co., 453 U.S. 332, 333-34, 101 S.Ct. 2789, 2796-97, 69 L.Ed.2d 672 (1981); Amato v. Western Union International, Inc., 773 F.2d 1402, 1416 (2d Cir. 1985), cert dismissed, 474 U.S. 1113, 106 S.Ct. 1167, 89 L.Ed.2d 288 (1986); Dhayer v. Weirton Steel Division of National Steel Corp., 571 F.Supp. 316, 328-29 (N.D.W.Va.), aff'd sub nom. Sutton v. Weirton Steel Division of National Steel Corp., 724 F.2d 406, 411 (4th Cir. 1983), cert denied, 467 U.S. 1205, 104 S.Ct. 1287, 81 L.Ed.2d 345 (1984); Moehle, 649 F.Supp. at 779." Hickman v. Tosco Corporation, 840 F.2d 564, 566-67 (8th Cir. 1988).

The evidence before the Trial Court and the Court of Appeals supported only one conclusion, namely that the Employing Company was acting as an employer, and

not as a fiduciary, in deciding whether the Petitioners' retirements were in the Company's interest. The Petitioners cite no evidence in the record which is in conflict with the Court of Appeals' holding. Indeed, the Petitioners provide no argument that the granting of 70/80 retirements would have served any interest of the Employing Company. To the extent that Petitioners suggest that the Pension Committee should have disregarded the Employing Company's decision not to grant the early retirements, they cite no authority that such a decision could be made by the Pension Committee without breaching its fiduciary duties. Indeed, the case law is entirely to the contrary. See, Berger v. Edgewater Steel Co., supra; Dzinglski v. Weirton Steel Corp., supra,; Fletcher

v. Kroger Co., supra; and, Nash by Nash v. Krivaja Beechbrook Corp., 866 F.2d 1053, 1055 (8th Cir. 1989). The literal language of paragraph 2.6(d) vests in the Employing Company, and not in the Pension Committee or the Petitioners, the determination of what is in the Employing Company's interest. The Pension Committee was bound to adhere to the provisions of the Pension Plan.

Not having breached their fiduciary duties to the Petitioners, the Respondents did not violate ERISA and the Petition for a Writ of Certiorari should be denied.

III.

Neither the Employer nor the Pension Committee discriminated against the Petitioners, in violation of 29 U.S.C. § 1140 of ERISA, by denying the requests

of the Petitioners for early retirement benefits.

The Petitioners have not alleged, nor is there any evidence to support a contention, that one or more of the Petitioners was discharged, fined, suspended, expelled, disciplined or discriminated against because he applied for a 70/80 mutually satisfactory retirement. All that the Petitioners have asserted is that the denial of the benefit falls within the proscriptions of 29 U.S.C. § 1140. Notably, when Petitioners first addressed this issue they candidly acknowledged that they were not alleging "that any of [Respondents'] officials made any intentional or negligent misrepresentations concerning the availability of 70/80 pensions." Plaintiffs' Memorandum in Support of

Plaintiffs' Motion for Partial Summary Judgment at page 12 n. 11. Without any change in the evidentiary record, the Petitioners would have this Court believe that Respondents have engaged in some form of unscrupulous conduct. Mere name calling on the Petitioners' part, however, is an insufficient basis to invoke the provisions of § 1140.

In construing the prohibition of 29 U.S.C. § 1140, the Courts have uniformly recognized that this section was designed primarily to prevent "unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights." West v. Butler, 621 F.2d 240, 245 (6th Cir. 1980). An essential element of plaintiffs' proof under this statute is to show that an employer was at least in

part motivated by a specific intent to engage in activity prohibited by this section. Dister v. Continental Group, Inc., 859 F.2d 1108, 1111 (2nd Cir. 1988); Gavalik v. Continental Can Co., 812 F.2d 834, 851 (3rd Cir.) cert denied, 484 U.S. 979, 108 S.Ct. 495, 98 L.Ed.2d 492 (1987); and, Titsch v. Reliance Group, Inc., 548 F.Supp. 983, 985 (S.D.N.Y. 1982), aff'd mem., 742 F.2d 1441 (2nd Cir. 1983). Petitioners are unable to point to any evidence that Respondents deliberately discriminated against the Petitioners for the purpose of interfering with their rights under the applicable Pension Plan, for no such evidence exists. Notably, the United States Court of Appeals for the Sixth Circuit considered arguments which were identical to those that the Petitioners

have advanced here and rejected the same as follows:

> Plaintiffs offer little support for their contention that the District Court erred. They argue solely that while other Portsmouth employees, including coke oven employees [i.e., the same employment department as the plaintiffs], were allowed to retire with shutdown pensions, plaintiffs were required to work for New Boston and were denied such benefits. While that may not be fair we do not believe that it constitutes a discriminatory action under § 1140.
>
> Varhola v. Doe, 820 F.2d 809, 816 (6th Cir. 1987).

The Courts have consistently recognized that no ERISA cause of action lies when loss of pension benefits was a mere consequence of, but not a motivating factor behind an employment decision. See, e.g., Gavalik, supra, 812 F.2d at 851 ("Proof of incidental loss of benefits as a result of termination will

not constitute a violation of § 510 [29 U.S.C. § 1140]."); Corum v. Farm Credit Services, 628 F.Supp. 707, 718 (D.Minn. 1986) (plaintiff must show more than "lost opportunity to accrue additional benefits" to sustain a § 510 claim); and, Baker v. Kaiser Aluminum & Chem. Corp., 608 F.Supp. 1315, 1319 (N.D.Calif. 1984) ("The only evidence offered by plaintiff is that if he had not been terminated, he would have been able to accrue additional benefits.") As the Trial Court and the Court of Appeals determined, the Petitioners have failed to demonstrate that their employment at LTV Steel Mining Company was adversely affected in any substantial way so as to be in violation of 29 U.S.C. § 1140. For these reasons, the Petition for a Writ of Certiorari should be denied.

Conclusion

Although the Petitioners are clearly dissatisfied with the evidentiary record before this Court, that evidentiary record is of their own making and is an appropriate basis upon which the Trial Court originally granted summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); and, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). There were no genuine issues as to any material fact before the Trial Court and the Respondents were entitled to judgment as a matter of law. The Petitioners have failed to advance any legal authorities which would question the propriety of the decisions of the Trial Court and the

Court of Appeals below, nor have they demonstrated any Rule 10 basis upon which to secure review by certiorari. For these reasons, Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

HANFT, FRIDE, O'BRIEN,
HARRIES, SWELBAR &
BURNS, P.A.
Raymond L. Erickson*
Richard J. Leighton
Attorneys for Respondents
1000 First Bank Place
130 West Superior Street
Duluth, Minnesota 55802
(218) 722-4766

*Counsel of Record